Supreme Court, U.S.
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CASE NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS ALLEN PRYTZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Is 18 U.S.C. §2252 unconstitutional in that there is no scienter requirement of the age of the minor engaged in sexually explicit conduct in the visual depiction received through the mails?

Was the Petitioner entrapped into committing a crime?

Should the Court have held under the facts presented that insufficient *mens rea* was required by the statute or demonstrated by the Petitioner to constitute a crime?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 1

STATEMENT OF THE CASE 1

BASIS FOR JURISDICTION IN THE DISTRICT COURT 2

REASONS FOR GRANTING THE WRIT 3

STATEMENT OF RELEVANT FACTS 3

ARGUMENT 5

CONCLUSION 16

APPENDIX A1

INDEX TO THE APPENDIX

Order of the District Court for the District of South Carolina .... 882 F. Supp. 311 (D.S.C.1993)

Unpublished Opinion of the Court of Appeals for the Fourth Circuit A-2

Statement of Additional Facts A-8

TABLE OF AUTHORITIES

CASES

Jacobson v. United States, 112 S. Ct. 1535 (1992) — 7, 9, 10, 12, 13, 14, 15, 17

Kadis v. United States, 373 F.2d 370 (1st Cir. 1967) — 8

Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) — 7, 14, 18

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952) — 15

Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958) — 8, 9

Sorrells v. United States, 287 U.S 435 (1932)	8, 11
Stanley v. Georgia, 394 S. Ct. 1243 22 L. Ed. 2d 542 (1969)	13
United States v. Becker, 62 F.2d 1007 (2d Cir. 1933)	8
United States v. Evans 924 F.2d 714 (7th Cir. 1991)	8
United States v. Gottesman, 982 F.2d 1285 (9th Cir. 1992)	6, 15
United States v. Hollingsworth, 9 F.3d 593 (7th Cir. 1993)	7, 8, 9, 10, 11, 12
United States v. Perl, 584 F.2d 1316 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979)	7
U.S. v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992)	6

STATUTES

Title 18 U.S.C. §2252	1, 2, 3, 5, 6
Title 18 U.S.C. §3231	1, 2
Title 18 U.S.C. §3742(a)	1
Title 28 U.S.C. §1291	1

OPINIONS BELOW

This is a criminal case which was brought by the United States in the District Court for the District of South Carolina where the Petitioner was convicted of violating Title 18 USC §2252(a)(2) and §2252(b) and sentenced to a term of imprisonment. The order of the District Court, denying Petitioner's Motions to Dismiss and Quash the Indictment, is published at 882 F. Supp.311 (D.S.C. 1993). The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court. The unpublished opinion of the Court of Appeals for the Fourth Circuit was decided on September 6, 1994 and is reproduced in the Appendix at page A-2.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 6, 1994. This Court has jurisdiction under 28 USC 1254 (1).

PROVISIONS OF LAW INVOLVED

The provisions of law are: Title 18 U.S.C. §2252; Title 18 U.S.C. §3231; Title 18 U.S.C. §3742(a); and Title 28 U.S.C. §1291.

STATEMENT OF THE CASE

The facts are stipulated and are not in dispute. The Petitioner was convicted in the District Court for violation of

Title 18 USC §2252(a)(2) and §2252(b) for charges that he knowingly received one video tape containing seven separate films which had been transported and shipped in commerce, said video tape containing visual depictions of minors engaged in sexually explicit conduct, the production of said visual depictions having involved the use of minors engaged in sexually explicit conduct.

Petitioner entered a conditional plea agreement on June 28, 1993 pleading "guilty to Count One of the Indictment subject to the Court's ruling in regard to the defense of entrapement and the other legal and constitutional issues raised by the facts as stipulated and by the supplemental facts submitted by the Petitioner and by the briefs and arguments heretofore submitted." (Emphasis Added).

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on the grounds that 18 U.S.C. §2252 is unconstitutional because it lacks a scienter element, that the Defendant was entrapped into committing a crime and that the Defendant lacked sufficient *mens rea* to be convicted. In its unpublished opinion, the Court of Appeals upheld and affirmed the decision of the District Court.

BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This case was initiated by the United States of America by the filing of an indictment in the District Court for the District of South Carolina on December 8, 1992 charging the Petitioner with violation of Title 18 USC §2252(a)(2) and §2252(b). Jurisdiction in the District Court was via Title 18 USC §3231, which states in pertinent part that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the court of the States, of all offenses against the laws of the United States." Id.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that this Court should grant the Writ in order to decide the important issues of federal law that should be, but have not been, settled by this Court: (1) that 18 U.S.C. §2252 is unconstitutional in that the Petitioner did not know the age of the participants and the government attempts to impose a standard of strict liability; (2) that the Petitioner was entrapped into committing a crime; and (3) that the Petitioner lacked sufficient *mens rea* to be convicted.

STATEMENT OF RELEVANT FACTS

Upon retiring from the U.S. Navy as a Command Master Chief (E-9), the Petitioner went to work for E.I. Dupont, Bushy Park Plant, Charleston. S.C. On January 12 through 14, 1992, he attended a training session in Minneapolis-St. Paul at Wagner Airless Pump Company. While staying at the Radisson Hotel in Minneapolis, Prytz visited a book store near his hotel and purchased a copy of the "premier issue" of a magazine apparently from South Carolina, his home, entitled *Carolina Express* magazine. . . "sexy swingers... all ads of North and South Carolina." Although quite lurid, there were no illustrations or any hint or depictions of child pornography in the magazine. Upon returning to Charleston on January 25, 1992, Prytz responded to two ads in the magazine, one of which is the government's case here, and the other to an advertiser *Just Looking*, which is also a government operation referred to in the investigative summary. The *Carolina Express* did not advertise child pornography. In responding to the *Just Looking* ad, the Petitioner received materials that made it clear that he was being referred to a selected person to receive or exchange some type of private material dealing with child pornography. He did not respond

to this lead any further.

The Petitioner sent a self-addressed stamped envelope on January 25, 1992, to "M&D" in Lancaster, S.C. but he was notified the name and address was changed: the response (by the U.S. Postal Service) indicated the business now known as *Crystal's Video* was "expanded and moved" to a new P. O. Box as well as a business address in Irmo, S.C. "M&D," the predecessor "company" to whom Prytz corresponded, was not in fact a child pornographer. The U.S. Postal Service in the guise of *Crystals' Video*, in responding to Prytz, offered every type of video tapes showing every possible sexual fantasy. It was like offering a drink to an alcoholic. Prytz, who had spent a military career viewing this type of thing, responded with an order. What is significant is Prytz responded to a perfectly legal ad and got back an illegal catalog. Prytz, of course, never viewed the videos, since the government seized the tapes upon delivery.

Prytz was familiar with other sexual materials that advertised that the participants were youthful, but in no prior instance of viewing the tapes were there ever depictions of children, but rather of actors playing children. Prytz did not on any of the contacts with *Crystals'* or *Just Looking* attempt to masquerade his identity or to act in a furtive manner. Prytz maintains that had he had a compelling interest in child pornography he had the opportunity on many instances of foreign deployments to collect this material, which he did not.

For thirty-one years, the Petitioner served in the military. Petitioner's military files and DD-214 reflect a career that has been distinguished and exemplary and Petitioner's character has been unimpeachable. Petitioner has been awarded the National Defense Service Medal, Vietnam Service Medal,

Vietnam Campaign Medal, Armed Forces Expeditionary Medal (2 Awards), Six Good Conduct Awards, Navy Unit Commendation, Meritorious Unit Commendation, Coast Guard SOS Ribbon (2 Awards), and the Coast Guard Meritorious Award. Flag officers were present at Petitioner's retirement ceremony which was telecast locally.

Petitioner was married for over twenty years with two children. His twenty-one year old son died in May 1987, from injuries sustained in an automobile accident. The loss of his son had a devastating effect on the family and the marriage ended in a divorce.

Petitioner maintains a close relationship with his daughter who is a pre-med student and, who with Petitioner's former brother-in-law, was prepared to testify as a witness to Petitioner's character.

ARGUMENT

1. UNCONSTITUTIONALITY OF 18 U.S.C. 2252.

The above statute, lacking the requirement of scienter, violates the Petitioner's fundamental Constitutional rights.

The relevant section of 2252 provides that:

(A) Any person who—

* * * * * *

(2) knowingly receives or distributes any visual depiction that has been mailed or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or

knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * * *

Section 2252 of Title 18 is fundamentally flawed in that it purports to, or its proponents urge that it creates a serious criminal penalty by strict liability. It is unconstitutional in that there is no scienter requirement on the age of minority by the Petitioner. U.S. v. X-Citement Video, Inc., U.S. v Gottesman, ____U.S.____ (Sup. Ct. Nov. 29, 1994, No. 93-723). In 1992 the government postal inspectors carefully crafted an offering of child pornography to Prytz based on his interest in general hard-core pornography. The in this case never saw the video tapes he ordered. Section 2252 on its face violates the First Amendment mandate in that the statute prohibiting distribution, shipping or receipt of child pornography should require knowledge of the minority of performers as an element of the crime it defines, and the relevant section of the Protection of Children Against Sexual Exploitation Act lacked a requirement that a defendant know that he is receiving child pornography and §2252 on its face violates the First and Fifth Amendments to the U. S. Constitution.

The government stipulated that the Petitioner contends "Prytz was familiar with other sexual materials that advertised that the participants were youthful, but in no prior instance of viewing these other tapes were there any depiction's of children, but of actors playing a youthful role. Prytz did

not on any of the contacts. . . attempt to masquerade his identity or to act in a furtive manner. The Defendant received the video tapes and before viewing them, the government seized the same tapes."

2. PETITIONER WAS ENTRAPPED AS A MATTER OF LAW.

A. The Government induced the crime.

The Court below has so distinguished Jacobson v. United States, 112 S. Ct. 1535 (1992) that it has no present application in the law of entrapment.

An entrapment defense has two elements: (1) government inducement and (2) lack of predisposition to commit the crime charged on the defendant's part. Mathews v. United States, 485 U. S. 58 (1988); see Jacobson v. United States, 112 S. Ct. 1535 (1992). Once a defendant who has pleaded the defense of entrapment makes a colorable case that he was indeed entrapped, the government, to convict, is required to prove lack of entrapment beyond a reasonable doubt. United States v. Hollingsworth, 9 F.2d 593 (7th Cir. 1993); see Jacobson v. United States, supra; United States v. Perl, 584 F. 2d 1316 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979).

The burden of proving anything beyond a reasonable doubt is heavy. United States v. Hollingsworth, supra. To defeat a defense of entrapment, the government must show either that it did not induce the defendant to commit the crime for which he is being prosecuted or, if it did induce, still he was predisposed to commit it. Mathews v. United States, supra, 485 U.S. at 6263; United States v. Hollingsworth, supra, 9 F. 3d at 597.

As observed in United States v. Hollingsworth, supra, in dealing with a claim of entrapment, it is important to ask why there is such a defense. In Hollingsworth, the court noted that the answers offered in the cases are various but convergent. 9 F. 3d at 597.

> Judge Learned Hand said that it was because of "a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist." United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933). In Sherman v. United States, 356 U.S. Supreme Court spoke of "play[ing] on the weaknesses of an innocent party and beguil[ing] him into committing crimes which he otherwise would not have attempted." An earlier decision by the Supreme Court had called it "unconscionable" "to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it." Sorrells v. United States, supra, 287 U.S. at 444, 53 S.Ct. at 214; see also id. at 451, 53 S.Ct. at 216. We have said that the doctrine's purpose "is to prevent the police from turning a law-abiding person into a criminal," United States v. Evans, supra, 924 F.2d at 717—from corrupting him, Kadis v. United States, 373 F.2d 370, 373 (1st Cir. 1967), in other words. "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the

> manufacturing of crime." Sherman v. United States, supra, 356 U.S. at 372, 78 S.Ct. at 820. "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law." Id. at 384, 78 S.Ct. at 826 (concurring opinion). In its most recent decision on entrapment the Supreme Court said that "when the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." Jacobson v. United States, supra, ____ U. S. at ____, 112 S. Ct. at 1543 (emphasis added).

Id. at 597-98.

The court in Hollingsworth found the animating idea behind the doctrine of entrapment to be: the federal government shall not use its resources to increase the criminal population by inducing people to commit crimes who otherwise would not do so.

Id at 598

The court explained:

> The reason that this is a matter of judicial concern rather than of unreviewable prosecutorial discretion is not that the courts want to economize on the costs of running the criminal justice system—the responsibility for the efficient allocation of resources to criminal prosecution is lodged elsewhere in our governmental system—but be-

> cause the proper use of the criminal law in a liberal society is to regulate potentially harmful conduct for the protection of society, rather than to purify minds and to perfect character. A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character.

Id.

"Predisposition" as an element of entrapment is understood to mean that the Petitioner was ready and willing to commit the crime that the government has set up before the government set it up. United States v. Hollingsworth, supra, 9 F.3d at 498 (citing Jacobson v. United States, supra). As explained in United States v. Hollingsworth, supra, the Supreme Court's formulation of the entrapment doctrine in Jacobson—that it bars the punishment of one who, if left to his own devices, probably would never have run afoul of the law— shows that willingness, the pure mental state, is not enough; there must also be readiness, in the sense that the Petitioner "was poised, was likely, to engage in criminal activity." 9 F.3d at 598. "A person who had dreams of criminality .... but no means of living them would be harmless and must be left alone." Id.

The court in Hollingsworth, supra observed that that was the situation in Jacobson, where the Court held as a matter of law that the defendant had been entrapped. As explained in Hollingsworth, supra, in Jacobson, supra, there were no extraordinary inducements, the sort of thing that might have tempted irresistibly even a person of law-abiding disposition, nor did Jacobson ever ex-

press a reluctance to purchase the child pornography—rather the contrary as the dissent emphasized. Nevertheless, the Supreme Court held that the defendant had been entrapped. It could find no evidence that Jacobson would have violated the law had it not been for the government's efforts. So far as appears, had the government left Jacobson alone, he would never have committed the crime for which he was convicted. "By convicting him the government did not remove a threat to society, it merely increased our already staggeringly large criminal population by one. It turned a harmless man with impure thoughts into a felon." United States v. Hollingsworth, supra, 9 F.3d at 599.

In Hollingsworth, a money laundering case, the court held that defendants were entrapped on the basis of inducements no different in essence from those used in this case. Defendants had placed an ad in a newspaper offering to sell their unused foreign banking license. Undercover government agents responded and offered them the opportunity to engage in money laundering activity. When this opportunity "beckoned, [defendants] were willing enough," such that a reasonable jury could have found defendants "predisposed" if that term referred merely to a "psychological state of willingness to break the law." Id.

But, as Hollingsworth held, if the concept of predisposition is to serve the purpose of the doctrine of entrapment, it must mean more—"must connote opportunity (what we are calling 'readiness') as well as willingness." Id. Only then will it illuminate what the Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932), called "'the controlling question whether the defendant is a person otherwise innocent whom the gov-

ernment is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.'" United States v. Hollingsworth, supra, 9 F.3d at 599 (quoting Sorrells v. United States, supra, 287 U.S. at 451). Under this concept of predisposition, the court held that defendants were not predisposed to commit the offense charged.

The court pointed out that its emphasis on a defendant's readiness to commit the crime without the government's assistance was implicit in the authoritative formulations of the doctrine of entrapment and compelled by the doctrine's function, in a liberal society, of confining criminal law to the prevention of dangerous activities. United States v. Hollingsworth, supra, 9 F.3d at 600. While it was true, as the court observed, that the defendants in Hollingsworth "did not merely dream; they also acted," they "would not have acted had the government not persuaded them to act." Id. The "government manufactured a crime; it turned bad thoughts into bad acts." Id. Accordingly, the court reversed the defendants' conviction on the basis of entrapment.

So, too, in this case, the Petitioner was entrapped. Had it not been for the government's efforts, Petitioner would not have committed the crime charged. While perhaps not overwhelming, the government's inducements were of the same essential type as offered in Jacobson and Hollingsworth, supra. The Petitioner's lack of reluctance was also no different, in essence, from that evidenced by the defendants in Jacobson and Hollingsworth, supra. Thus, the reasoning in those cases is equally applicable to this case. In this case, as in those cases, the government manufactured a crime. It turned bad thoughts into bad acts. It turned a harmless man with

impure thoughts into a felon. If the concept of entrapment is to serve its purpose and function, it must be found applicable in this case. Therefore, it must be held that Petitioner was entrapped as a matter of law.

B. The Petitioner was not predisposed to violate the Child Protection Act.

Under Jacobson v. U.S., 112 S. Ct. 1535 (1992), the government, if it induced the commission of the crime, is not only charged to prove that the Petitioner was predisposed to commit the crime, "The sole issue is whether the Government carried its burden of proving that Petitioner was predisposed to violate the law *before* the Government intervened. " Jacobson, supra at 1541. Here, as in Jacobson, supra, the government made no effort to monitor the Petitioner's mail to determine what his activities were. The only evidence argued by the government for predisposition is the computer entry that shows no indication as to what the material was, even though it was apparently seized and in the government's possession.

If anything, the investigative evidence does shows that the Petitioner had a predisposition to view sexually oriented videos. The second tape allegedly intercepted by the government through customs for the Petitioner is not even the same generic interest as child pornography and, although not constitutionally protected, he certainly had a right to view these adult materials within the privacy of his own home which was protected with a constitutional zone of privacy. Stanley v. Georgia, 394 S. Ct. 1243, 1248, 22 L.Ed. 2d 542 (1969).

The Petitioner's purchase of *Carolina Express* made him the target of two investigations. When it became clear, obviously from the "*Just Looking*" inquiry, of the nature of the

interest he was being directed to, he showed no interest and terminated the contact. There was, in fact judging from the materials found in his home and the other materials ordered, Petitioner would not have had an interest in child pornography unless it was one generated by the offer from the government. The only evidence of predisposition is simply a computer entry. The 1988 interception by customs gives no description of the material and, if anything at all, was an unsolicited catalog that the Petitioner had, apparently, been receiving of advertisements of other material. Surely that explanation is reasonable considering no action was followed up on by the government other than the entry into the government computer.

Even without predisposition, the government contends that the Petitioner is not entitled to the entrapment defense because the agent in this case only offered the Petitioner the opportunity to order child pornography through the mail. "It is unlikely that his entrapment defense would have warranted a jury instruction." Jacobson, supra, citing Mathews v. United States, 485 U S 58, 66, 108 S. Ct. 883, 886, 99 L. Ed. 2d 54 (1988).

That is not what happened in this case and that is not what happened in the Mathews case. In Mathews, supra, the government operative offered the Defendant, an employee at the Small Business Administration, a bribe because Matthews had repeatedly asked him, a banker, for loans. Finally, the government operative offered the loan which Mathews readily accepted and met him at a restaurant to receive the money.

Here, the Petitioner wrote the government's undercover operation on the basis of the advertisement in the *Carolina Express*. The Petitioner's interest in viewing explicit sexual material was used by the government to then order up for

the Petitioner a list of the widest, most extensive and bizarre range of sexual material known to man. "M&D" who originally placed the ad in *Carolina Express* was not a child pornographer. This list was compiled and edited and described by Agents of the U. S. Postal Service. This wasn't the Petitioner inquiring about all these materials, but "*Crystal's Video Universe*" (a/k/a the U.S. Postal Service) offering a menu of anything and everything to provoke and titillate any voyeuristic sexual interest. What is significant is Prytz responded to a perfectly legal ad and got back an illegal catalog. The Petitioner was not guarded about who he was or the use of his name by providing *Crystals'* a bank draft or check on his account or by calling *Crystals'* to find out about the status of his order. His actions in no way betrayed he was acting in a criminal fashion. The evidence-in-chief in this case, the tapes, was assembled from ancient film seized by the government and remanufactured and edited by the government to be delivered to the Petitioner (or to anyone else who might chance to order it). Even without the constitutional issue raised by Gottesman, the liberty issue and the standards set out in Jacobson have been clearly violated.

3. UNDER THE FACTS OF THE INSTANT CASE THE PETITIONER LACKS THE *MENS REA* REQUIREMENT THAT WOULD CONSTITUTE HIS ACTS A CRIME.

The classic statement of *mens rea* in the federal system is contained in Mr. Justice Jackson's great opinion in Morissette v. U.S., 342 U.S. 246, 72 S. Ct. 240, 96 L.Ed. 288 (1952). Morissette, a veteran of World War II, who like Prytz, had an unblemished military career record, collected three tons of smoke bomb shell casings from a bombing range in a rural area of Michigan which he trucked to market and sold for $84. Morissette, by occupation, was a fruit stand

operator in summer and a trucker and scrap iron collector in winter. Morissette's free admission that he took the casings caused the trial judge (just as Judge Norton does of Prytz's admission) to conclude that settles the matter. To convict Prytz simply to uphold easy prosecutions under the Child Protection Act gives a lie to the great tradition of American and English criminal law that fails to make either Morissette or Prytz a felon.

The Government agents cleverly made the offer of pornography appear as legitimate and attractive as possible. The government agent deliberately offered the child pornography at various low prices for the very purpose of enticing someone who might have a general interest in explicit sexual videos who might not be interested in child pornography, but if it were a "bargain", he might be more induced to buy what was advertised out of curiosity. However slight that increased inducement might be, it was perverse that it was done in the name of the government. The government agents deliberately created the most legitimate and attractive bait to lure someone with a general interest into ordering the only obscene material that would carry with it a heavy and deadly penalty. The reason for this is obvious in the investigative summaries. The government investigators found the other sexual materials that the Petitioner was interested in to be just as repugnant as the child pornography, in spite of its possible constitutional protection. It is notable that the search of the Petitioner's home also revealed no predisposition towards crime or pornography involving children.

CONCLUSION

The government contends it "tested the (Petitioner) one time" and he failed. The chilling thing about the government's conclusion is that, if the Petitioner can be convicted, the government, under the same analysis, could theo-

retically test any passersby and, if they fail, they likewise will lose their rights as citizens of the United States. The logic of the government's argument in this case is that any consumer has to be guarded about any advertisement to which he responds.

Freedom has been defined as to be lacking in fear of one's own government. The government's actions here, if legitimized, place every citizen on guard. If you can entice a man of the Petitioner's distinction, a man who has defined himself as a patriot for thirty-one years and has been defined as such, then the government by inducement can make anyone a criminal.

The Petitioner's journey to Minneapolis was a fateful one. He is a successful man and there is every reason to believe that had he not encountered and engaged with the government agents of *Crystal's Videos*, he never would have shown any interest in child pornography, at least enough to order it, had not the government created the opportunity for him to order it. That is the entire point of Jacobson and is even more credible in the circumstances of this Petitioner's life.

Systematic morals testing of its citizens should not be the role of government. The huge increase in the quantity and types of pornography that have become available since the 1960s, however, has left many people uneasy. The National Commission on Obscenity and Pornography in 1970 could find no link between the consumption of pornography and antisocial behavior. Even if a decisive link between pornography and violent behavior is eventually proved, it is difficult to see how a definition of pornography could be drawn that would not abridge free speech guarantees.

It is clear from the facts here and from the investigative summary that the Petitioner was interested, in the

investigator's mind, in hard core pornography and that the child pornography was just used as a tool to convict him. While the protection of children may be a legitimate interest, moral litmus testing should not be the interest of the Federal Government. The Petitioner did not behave as a criminal. A man with his experience and knowledge in the Naval establishment for some 31 years, had he thought he were breaking the law, would have acted other than he did. It is only logical to assume that had the Petitioner thought he was violating the law, one easy way to avoid prosecution would have been for him to go to Irmo, South Carolina and purchase any amount of child pornography in person and not through the mails.

To convict the Petitioner is to make it possible to induce any citizen to violate the law without any other indication that he was so inclined to violate the law. Mathews, supra, and those line of cases do not allow that and do not allow for inducement without predisposition or inclination to commit a crime.

Petitioner prays that this court grant the Writ of Certiorari to review this action and to reverse the judgment below.

Respectfully submitted,

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December 6, 1994

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

THOMAS ALLEN PRYTZ,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX

Order of the District Court for the District of South Carolina 882 F. Supp. 311 (D.S.C.1993)

Unpublished Opinion of the Court of Appeals for the Fourth Circuit A2

Statement of Additional Facts A8

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS ALLEN PRYTZ,

Defendant-Appellant.

No. 94-5006

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
David C. Norton, District Judge.
(CR-92-593)

Argued: June 10, 1994

Decided: September 6, 1994

Before ERVIN, Chief Judge, PHILLIPS, Senior Circuit Judge, and JACKSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gordon H. Garrett, GARRETT LAW OFFICES, North Charleston, South Carolina, for Appellant. Joseph P. Griffith, Jr.,Assistant United States Attorney, Charleston, South Carolina, for Appellee. **ON BRIEF:** J. Preston Strom, Jr., United States Attorney, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P.36.5 and 36.6.

OPINION

PER CURIAM:

Thomas Allen Prytz appeals his conviction for violating the federal anti-child pornography laws. His primary claim is that the statute under which he was indicted and convicted, 18 U.S.C. Section 2252, is unconstitutional because, he contends, it lacks a necessary scienter requirement. In addition, Prytz argues that he was entrapped. Finally, he suggests that the use of an anticipatory search warrant was improper. The district court denied these claims, and we affirm.

I.

The facts surrounding Prytz's indictment are detailed in the opinion of the district court. United States v. Prytz, 822 F. Supp. 311 (D.S.C. 1993). In short, in early 1992, a letter containing a self-addressed envelope (bearing Prytz's address) and postage was received by a pornography outlet that recently had been raided and taken over by federal postal inspectors and law enforcement officials (hereinafter "the government"). Following up, the government mailed to Prytz in his self-addressed envelope a letter which gave Prytz the opportunity to choose five out of a possible 100 categories of sexually explicit video tapes. The letter also provided Prytz

the opportunity to inform the purported sex video company that he was not interested in such material and wished to be removed from the mailing list.

Prytz returned the letter showing his selection of the sexual categories of "animal", "bull", "dogs", "K-9 oldies",[1] and, critical to this prosection, "incest". Evidence before the court indicated, and Prytz does not dispute, that purveyors and recipients of pornographic materials (as well as the government officials who investigate them) understand that "incest" refers to child pornography. Upon receiving Prytz's letter, the government mailed back an order form describing a range of bestiality tapes, and, under the category of "Incest Video Tapes," seven titles and descriptions clearly suggesting child pornography (e.g. Lolita Girls and Boy"). Prytz promptly ordered and paid for all seven of the child pornography tapes, plus four of bestiality.

The government sent several of the child pornography tapes to Prytz in February 1992. Just prior to the mailing of the tapes, an "anticipatory" federal search warrant was sought and obtained and upon Prytz's receipt of the tapes, it was executed. Prytz was then indicted under 18 U.S.C. Section 2252(a)(2),[2] which prohibits the receipt of child pornography, and Section 2252(b), the statute's penalty provision.

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[1] These four categories relate to forms of bestiality.

[2] 18 U.S.C. § 2252 (a)(2) provides in relevant part: "Any person who-. . .knowingly receives [ ] any visual depiction that has been mailed [ ] in interstate commerce [ ], if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . . shall be punished as provided in subsection (b)."

By timely pre-trial motions, Prytz moved to dismiss the indictment on the ground that Section 2252(a)(2) was unconstitutional; moved to dismiss on the ground that the was entrapped; and moved to suppress evidence obtained pursuant to the anticipatory search warrant, The district court denied all of Prytz's motions, whereupon Prytz entered a conditional plea of guilty and noticed this appeal.

II.

Prytz's challenge to the constitutionality of 18 U.S.C. Section 2252(a)(2) is based on the contention that it does not contain a scienter requirement that runs to all its elements. Specifically, the contention is that "knowingly" in subsection (2) of the statute only modified "receives" and does not also require knowledge that material received "involves the use" or "visual depiction" of a minor, so that the statute fails under cases such as New York v. Ferber, 458 U.S. 747 (1982). In support of this contention, Prytz relies on the split panel decision of the Ninth Circuit in United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992), cert. granted, — U.S.—, 114 S.Ct. 1186 (1994). The district court rejected this contention, while conceding the grammatical problem created by the statute's text.

We agree with the district court, and with all the other circuit courts that have addressed the issue, that the statute's "knowingly" requirement runs to all substantive elements of the offense, and that the statute is not therefore unconstitutional on that account. See United States v. Gendron, 18 F.3d 955 (1st Cir. 1994); United States v. Colavito 19 F.3d 69 (2nd Cir. 1994); United States v. Cochran, 17 F.3d 56 (3rd Cir. 1994); United States v. Schmeltzer, 20 F.3d 610 (5th Cir. 1994), United States v. Burian, 19 F.3d 188 (5th Cir. 1994); United States v. Brown, 25 F.3d 307 (6th Cir. 1994).

III

We next address Prytz's contention that the district court erred in rejecting his entrapment defense. We find no error. Entrapment occurs when (1) the government "induces" criminal behavior, (2) by a defendant who was not "predisposed" to commit the crime. See United States v. Osborne, 935 F.2d 32, 37-39 (4th Cir. 1991); see also Gendron, 18 F.3d at 960. It is an affirmative defense as to which a defendant carries an initial burden of producing evidence of inducement "beyond a mere scintilla" in order to shift to the government any burden to prove predisposition. Osborne, 935 F.2d at 38. Critically, as the district court recognized, the defendant's "(p)roof of inducement required more than proof of mere solicitation.: 822 F. Supp. at 317, citing Osborne, 935 F.2d at 37-39.

We agree with the district court's conclusion, 822 F. Supp. at 316-319, that the government's conduct never crossed, nor even approached, the line between solicitation and inducement. The entrapment defense was therefore properly rejected as a matter of law.

IV

We address finally Prytz's challenge to the legality of the "anticipatory" search warrant which allowed the government to search his house for the mailed pornographic materials almost contemporaneously with their delivery. Such a warrant, applied for before the materials were posted, was issued pursuant to a postal inspector's affidavit describing Prytz's conduct in ordering the materials.

The district court did not err in upholding the validity of the warrant's use in this case, and refusing to suppress the evidence it produced. In United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988), we held that where child pornography (contraband) "is on a sure course to its destination, as in the mail,

prior issuance of a warrant is permissible." 854 F.2d at 36, quoting United States v. Hale, 784 F.2d 1465 (9th Cir. 1986). The facts before the district court easily met the Goodwin requirement.[3]

AFFIRMED

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[3] Prytz also vaguely suggests in his appellate brief the existence of an issue of the sufficiency of the evidence to find the requisite scienter. Appellee's Br. pp. 1, 14-15. The government rightly points out that this issue was not raised-indeed could not have been raised -in the district court, where proceedings were terminated before trial by the conditional guilty plea.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Criminal No: 92-00593

UNITED STATES OF AMERICA

vs.

THOMAS A. PRYTZ

Defendant's Statements of Fact

The U. S. Postal Service had, apparently, obtained from the computer files of the Federal Bureau of Investigation indication that on or about June 13, 1988, U. S. Customs seized an incoming foreign piece of mail addressed to Defendant which allegedly contained child pornography and, on October 7, 1991, a video tape containing bestiality. The U. S. Government's "raw data" files do not indicate precisely what the 1988 foreign piece of mail was, i.e., a letter, video tape, or book, or other material, and Defendant adamantly denies that he ever ordered any materials of any kind relating to child pornography prior to the solicitations he received from the U. S. Government.

The actual content of the foreign pieces of mail is unknown. The Defendant maintains he never solicited or expressed an interest in child pornography and no legal action resulted at the time; However, information regarding these alleged mailings was retained in the FBI computer files. The Defendant does admit ordering the 1991 video that he never received. Defendant was receiving catalogs and other solicitations from Denmark, however, during this period.

For thirty-one years, the Defendant served in the military. Defendant's military files and DD-214 reflect a career that has been distinguished and exemplary and Defendant's character has been unimpeachable. Defendant has been awarded the National Defense Service Medal, Vietnam Service Medal, Vietnam Campaign Medal, Armed Forces Expeditionary Medal (2 Awards), Six Good Conduct Awards, Navy Unit Commendation, Meritorious Unit Commendation, Coast Guard SOS Ribbon (2 Awards), and the Coast Guard Meritorious Award. Flag officers were present at Defendant's retirement ceremony.

Defendant was married for over twenty years with two children. His twenty-one year old son died on May 22, 1987, from injuries sustained in an automobile accident. The loss of his son had a devastating effect on the family and the marriage ended in a divorce.

Defendant maintains a close relationship with his daughter, who is a pre-med student, and Defendant's former brother-in-law, both of whom were prepared to testify as witnesses to Defendant's character.

Upon retiring from the Navy, the Defendant went to work for E.I. Dupont, Bushy Park Plant, Charleston, S.C. On January 12 through 14, he attended a training session at Minneapolis-St. Paul at Wagner Airless Pump Company. While staying at the Radisson Hotel in Minneapolis-Minnetonka, Prytz visited a book store near his hotel and purchased a copy of the "premier issue" of a magazine apparently from South Carolina entitled Carolina Express magazine..."sexy swingers... all ads of North and South Carolina." There were no intimations or any hint of depiction's of child pornography in the magazine. Upon returning to Charleston on January 25, 1992, Prytz responded to two ads, one of which is the government's case here, and the other to an advertiser "Just

Looking," which is also a government operation referred to in the investigative summary. The Carolina Express did not advertise child pornography. In responding to the "Just Looking" ad, the Defendant received materials that made it clear that he was being referred to a selected person to receive or exchange some type of private material dealing with child pornography. He did not respond to this lead any further.

The Defendant in ordering from "Crystal Video," presumed he was dealing with an established commercial establishment. In fact, Prytz sent a self-addressed stamped envelope on January 25, 1992, to "M&D" in Lancaster, S.C., but he was notified the name and address was changed: the response (by the government) indicated the business now known as "Crystal's video" was "expanded and moved" to a new P.O. Box as well as a business address in Irmo, S.C. The predecessor "company", "M&D," to whom Prytz corresponded, was not in fact a child pornographer.

Prytz was familiar with other sexual materials that advertised that the participants were youthful, but in no prior instance of viewing these other tapes were there ever depictions of children, but of actors playing a youthful role. Prytz did not on any of the contacts with "Crystal's" or "Just Looking" attempt to masquerade his identity or to act in a furtive manner. The Defendant received the video tapes and before viewing them, the government seized the same tapes. Prytz did have an interest in sexually explicit videos, but maintains that had he had a compelling interest in child pornography he had the opportunity on many instances of foreign deployments to collect this material, which he did not. The government agent who corresponded with Prytz indicated the prices of the tapes to be "reasonable." The tapes were not priced as "contraband" and Prytz maintains he ordered them out of curiosity. When the Government agents searched Prytz's

home they found several pamphlets advertising assorted materials of widely varied sexual interest. There was no child pornography found in the home excepting, of course, the materials seized by the U. S. Postal Inspector as described in the investigative summary.

These explanations are supplementary to the investigative summary which the defendant does not deny.

(2)

No. 94-1074

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In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS ALLEN PRYTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional in that it does not require the government to prove that the defendant knew that the materials at issue depicted minors engaged in sexually explicit acts.

2. Whether the evidence was sufficient to support the jury's finding that petitioner was not entrapped.

3. Whether the evidence was sufficient to support the jury's finding that petitioner possessed the requisite scienter under the child pornography statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Jacobson v. *United States*, 112 S. Ct. 1535 (1992)	3, 5, 6
Mathews v. *United States*, 485 U.S. 58 (1988)	5
McCarthy v. *United States*, 394 U.S. 459 (1969)	8
United States v. *Broce*, 488 U.S. 563 (1989)	8
United States v. *Hollingsworth*:	
9 F.3d 593 (7th Cir. 1993)	7
27 F.3d 1196 (7th Cir. 1994) (en banc)	7
United States v. *Osborne*, 935 F.2d 32 (4th Cir. 1991)	5
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994)	4

Statute:

18 U.S.C. 2252(a)(2)	2, 3, 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is unpublished, but the decision is noted at 35 F.3d 557 (Table). The opinion of the district court is reported at 822 F. Supp. 311.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1994. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the District of South Carolina,

petitioner was convicted of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to six months' confinement in a halfway house, to be followed by five years' probation. Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. A1-A7.

1. In early 1992, a pornography distributorship that had been raided and taken over by federal law enforcement officers received a letter containing a self-addressed envelope bearing petitioner's address. Thereafter, the officers mailed to petitioner in his self-addressed envelope a letter that gave petitioner the opportunity to choose five out of 100 categories of sexually explicit videotapes. The letter also provided petitioner with the opportunity to inform the distributorship that he was not interested in such material and wished to be removed from the mailing list. Pet. App. A3-A4.

Petitioner returned the letter showing his selection of the following categories: "animal," "bull," "dogs," "K-9 oldies," and "incest." Purveyors and recipients of child pornography understand that "incest" refers to child pornography. On receiving petitioner's letter, the officers mailed back an order form describing a range of bestiality tapes and, under the category "Incest Video Tapes," seven titles, such as "Lolita Girls and Boy," clearly suggesting child pornography. Pet. App. A4. The description of each of the child pornography tapes stated that the tapes showed youths ranging in age from nine to 16 engaging in sexually explicit conduct. Petitioner promptly ordered and paid for all seven of the child pornography tapes, plus four bestiality tapes. Pet. App. A4; 822 F. Supp. 311, 318 (D.S.C. 1993).

In February 1992, the officers sent several of the child pornography tapes to petitioner. Moments after the delivery of the tapes to petitioner's apartment, postal

inspectors executed an "anticipatory" search warrant for the apartment and seized the tapes. Pet. App. A4. During the search they also found a number of foreign advertisements for child pornography, as well as correspondence indicating that petitioner had expressed an interest in child pornography in connection with another government sting operation. Gov't C.A. Br. 14.

2. Before trial petitioner moved to dismiss the indictment on the ground that the government had entrapped him into receiving child pornography, and that the government's misconduct was so egregious as to violate due process. 822 F. Supp. at 316. In denying the motion, the district court held that petitioner had not been entrapped. *Id.* at 319. The court pointed out that petitioner's initial communication with the pornography distributor was not in response to any advertisement devised by the government. *Id.* at 317-318. Citing *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), the court also observed that the government had "merely solicited [petitioner's] response using a law enforcement technique which has been specifically approved by the United States Supreme Court." 822 F. Supp. at 318. The court concluded that "[n]othing about the government's contacts with [petitioner] g[a]ve rise to the type of inducement that an ordinary person would not feel free to reject." *Id.* at 317. Petitioner subsequently entered into a conditional plea agreement under which his guilty plea was made "subject to the Court's rulings in regard to the defense of entrapment and the other legal and constitutional issues raised by the facts as stipulated and by the supplemental facts submitted by the [petitioner] and by the briefs and arguments as heretofore submitted." C.A. App. 108.

3. On appeal, petitioner challenged the constitutionality of Section 2252(a)(2) on the ground that it

does not require knowledge of the minority of the performers depicted engaging in sexually explicit acts. The court of appeals rejected that claim, holding that the word "knowingly" in the statute "runs to all substantive elements of the offense." Pet. App. A5.

Petitioner also contended that he had been entrapped by the government into receiving the child pornography. The court of appeals held that "the government's conduct never crossed, nor even approached, the line between solicitation and inducement," and that petitioner's entrapment claim was therefore without merit. Pet. App. A6.

Finally, the court of appeals noted that petitioner "vaguely suggest[ed] in his appellate brief the existence of an issue of the sufficiency of the evidence to find the requisite scienter." Pet. App. A7 n.3. The court did not address that contention, however, pointing out that the claim had been waived by petitioner's guilty plea. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-7) that 18 U.S.C. 2252 (a)(2) does not require the government to prove that the defendant knew that the materials at issue depicted minors engaged in sexually explicit acts, and that the statute is therefore unconstitutional. Shortly before the filing of the petition, however, the Court rejected that contention in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), which construed Section 2252(a)(2) to require knowledge of the minority of the performer.

2. Petitioner contends (Pet. 7-15) that the evidence was insufficient to support the jury's conclusion that he was not entrapped. The affirmative defense of entrapment has two related elements: (1) government inducement of the crime; and (2) a lack of predisposition on the

part of the defendant. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). Neither element was present here.

The government offered petitioner no inducement to purchase the child pornography. The government's initial mailing merely invited petitioner to indicate, by subject matter, the types of sexual material in which he was interested. Petitioner circled the "incest" category, among others, and returned the form. The government then sent petitioner an order form, and petitioner ordered several videotapes whose titles plainly indicated that they depicted children engaged in sexual activity. The government made no attempt to persuade petitioner to purchase child pornography; it simply afforded him an opportunity to do so. In the words of the court of appeals (Pet. App. A6), the government's conduct did not "even approach[] the line between solicitation and inducement."

The evidence also showed that petitioner was predisposed to receive child pornography. A person not so predisposed would have undoubtedly felt free to reject the government's solicitation; indeed, the initial mailing offered petitioner the opportunity to check a box indicating that he was not interested in the solicitation and wished to be removed from the mailing list. Pet. App. A3-A4. Petitioner's ready response to the government's solicitation showed that he was of "a frame of mind such that, once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion." *United States* v. *Osborne*, 935 F.2d 32, 38 (4th Cir. 1991).

Petitioner's reliance (Pet. 13-15) on *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), is unavailing. In *Jacobson*, the government learned that a bookstore had mailed the defendant magazines containing photographs of naked children. The government subsequently mailed

the defendant correspondence from five different government-sponsored sham organizations, as well as from a postal inspector posing as a pen pal. The correspondence began with a "sexual attitude questionnaire," which elicited from the defendant a general interest in "pre-teen sex." The correspondence made references to child pornography and sometimes depicted the senders as "free speech" lobbying organizations and fighters for "the right to read what we desire." Some mailings raised the specter of censorship. After two-and-one-half years on the government mailing list, the defendant was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship. When he later received a catalogue, he ordered a magazine depicting young boys engaged in sexual activities. 112 S. Ct. at 1537-1540.

In holding that the evidence was insufficient to show that Jacobson was predisposed to receive child pornography, this Court explained that the defendant's correspondence was indicative at most of a predisposition to view photographs of pre-teen sex and to promote an anti-censorship agenda, but not of a willingness to commit the crime of receiving child pornography. 112 S. Ct. at 1542. The Court further reasoned that "[t]he evidence that [the defendant] was ready and willing to commit the offense came only after the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." *Id.* at 1543. The Court concluded that "[r]ational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [the defendant]." *Ibid.*

This case is significantly different from *Jacobson*. Here the government engaged in no campaign to persuade petitioner to purchase child pornography. Nor did it disguise itself as an anti-censorship organization or ask petitioner to purchase child pornography based on principle. Rather, the government simply provided petitioner with a single opportunity to purchase child pornography, and petitioner readily responded to that opportunity.

Nor is petitioner helped by *United States* v. *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc).* In *Hollingsworth* the defendants placed a newspaper advertisement to sell their unused foreign banking license. An undercover agent answered the advertisement by offering the defendants the opportunity to engage in money laundering. After several months of prodding by the government, the defendants accepted the offer. The court of appeals concluded that the defendants had been entrapped because they "had no prayer of becoming money launderers without the government's aid," *id.* at 1202. The court explained that in its view "[p]redisposition is not a purely mental state, the state of being willing to swallow the government's bait." *Id.* at 1200. Rather, a person who responds willingly to the government's offer may still lack the requisite predisposition if he "is not in a position without the government's help to become involved in illegal activity." *Ibid.*

Under the *Hollingsworth* standard, petitioner was clearly predisposed to commit the crime of which he was

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* Petitioner heavily relies (see Pet. 8-13) on the panel opinion in *United States* v. *Hollingsworth*, 9 F.3d 593 (7th Cir. 1993). The en banc majority's analysis in *Hollingsworth* is largely consistent with the approach taken by the panel in that case.

convicted. Petitioner's ready response to the government's single offer of child pornography indicated that he was prepared to commit the offense whenever the opportunity arose, without any inducement from government agents. Moreover, as the presence in his apartment of foreign advertisements for child pornography attested, petitioner, unlike the defendants in *Hollingsworth*, had the means to commit the charged offense absent any assistance from the government.

3. Petitioner contends (Pet. 15-16) that the evidence was insufficient to support a finding that he possessed the requisite scienter. As the court of appeals held, see Pet. App. A7 n.3, petitioner raised no such claim before the district court, and he waived any challenge to the sufficiency of the evidence by opting to forgo a trial and plead guilty. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1995